Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
____ TERM, 2002
NO._____

Thomas Holway
and
Ellie Holway,

Petitioners,

-vs.-

State of South Dakota,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH DAKOTA SUPREME COURT

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QUESTION PRESENTED

I. WHETHER THE DECISION OF THE SOUTH DAKOTA SUPREME COURT, HOLDING THAT SDCL § 22-42A-4 IS NOT UNCONSTITUTIONALLY VAGUE BECAUSE SDCL § 22-42A-1 CREATES AN OBJECTIVE STANDARD, VIOLATE PETITIONERS' RIGHT TO PROCEDURAL DUE PROCESS?

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IN THE SUPREME COURT OF THE UNITED STATES

____TERM, 2002

Thomas Holway
and
Ellie Holway

Petitioners,

-VS.-

State of South Dakota,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of South Dakota

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Petitioners, Thomas and Ellie Holway, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of South Dakota entered on May 1, 2002.

OPINION BELOW

The judgment of the Supreme Court of the State of South Dakota is included in the Appendix as App. 1.

JURISDICTION

Petitioners Thomas and Ellie Holway were found guilty by a jury of three counts of delivery of drug paraphernalia in violation of South Dakota Codified Law (SDCL) 22-42A-4. On Count I, Thomas was sentenced to 90 days of Jail; Ellie was sentenced to 90 days home detention. On Counts III and VII, both Thomas and Ellie were sentenced to two (2) years in the state penitentiary, with the sentence suspended. These sentences were imposed by the Honorable James W. Anderson, Circuit Court Judge, Sitting by Designation in the Seventh Judicial Cirucit, State of South Dakota. The Supreme Court of the State of South Dakota affirmed the sentence in a published

opinion at 2002 SD 50, filed on May 1, 2002. App. 1. This Court has jurisdiction to review the judgment of the Supreme Court of the State of South Dakota pursuant to Title 28, United States Code § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or other wise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces , or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

SDCL § 22-42A-1, titled "Drug paraphernalia"defined, provides that:

> The term "drug paraphernalia" means any equipment, products and materials of any kind which are primarily used, intended for use or

designed for use by the person in possession of them, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body any controlled substance or marijuana in violation of the provisions of this chapter. It includes, but is not limited to:

(1) Kits used, intended for use or designed for use in plainting, propogating, cultivating, growing, or harvesting of any species of plant which is a controlled substance or marijuana of from which a controlled substance can be derived;

(2) Kits used, intended for use or designed for use in manufacturing, compounding, converting, producing, processing or preparing controlled substances;

(3) Isomerization devices used, intended for use or designed for use in increasing the potency of marijuana or any species of plant which is a controlled substance;

(4) Scales and balances used, intended for use or designed for use in weighing or measuring controlled substances;

(5) Diluents and adulterants, sush as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use or designed for use in cutting controlled substances;

(6) Separation grins and sifters used, intended for use or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana;

(7) Capsules, balloons, envelopes and other containers used, intended for use or designed for use in packaging small quantitites of controlled substances or marijuana;
(8) Containers and other objects used, intended for use or designed for use in storing or concealing controlled substances or marijuana;
(9) Hypodermic syringes, needles and other objects used, intended for use or designed for use in parenterally injecting controlled substances into the human body; and
(10) Objects used, intended for use or designed for use in ingesting, inhaling or otherwise introducing marijuana, cocaine, hashish or hashish oil into the human body, such as:
(a) Metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens, permanent screens, hashish heads or punctured metal bowls;
(b) Water pipes;
(c) Carburetion tubes and devices;
(d) Smoking and carburetion masks;
(e) Roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
(f) Miniature cocaine spoons and cocaine vials;
(g) Chamber pipes;
(h) Carburetor pipes;
(i) Electric pipes;
(j) Air-driven pipes:
(k) Chillums;
(l) Bongs; and
(m) Ice pipes or chillers.

SDCL § 22-42A-2, titled "Factors considered in determining whether an object is drug paraphernalia," provides that:

> In determining whether an object is drug paraphernalia as defined in SDCL § 22-42A-1, a court or other authority shall consider, in addition to all other logically relevant factors, the following:
> (1) Statements by an owner of by anyone in control of the object concerning its use;
> (2) The proximity of the object, in time and space, to a direct violation of this article;
> (3) The proximity of the object to controlled substances or marijuana;
> (4) The existence of any residue of controlled substances or marijuana on the object;
> (5) Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to any person whom he knows, or should reasonably know, intends to use the object to facilitate a violation of this article;
> (6) Instructions, oral or written, provided with the object concerning its use;
> (7) Descriptions, oral or written, accompanying the object which explains or depict its use;
> (8) National and local advertising concerning its use;
> (9) The manner in which the object is displayed for sale;
> (10) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community;
> (11) Direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise;

(12) The existence and scope of legitimate uses for the object in the community; and
(13) Expert testimony concerning its use.

SDCL § 22-42A-4, titled Delivery of Drug Paraphernalia as Felony, provides that:

> No person, knowing the drug related nature of the object, may deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance or marijuana in violation of this chapter. Any person who violates any provision of this section is guilty of a Class 6 felony.

STATEMENT OF THE CASE

The Amended Information filed on June 7, 2001, charged Petitioners with seven counts of Delivery of Drug Paraphernalia in violation of SDCL § 22-42A-4. Clerk's Docket, hereafter "D.No.," 129. Petitioners were charged with delivering items of drug paraphernalia on or about the 14th day of April, 2000, through the 25th day of April, 2000,

in the County of Pennington, State of South Dakota, in that they did, knowing the drug related nature of the objects, delivered, possessed with intent to deliver, drug paraphernalia, knowing or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance or marijuana.

On June 6, 2001, Petitioners were convicted of three counts of Delivery of Drug Paraphernalia following a two day jury trial. On July 25, 2001, the Honorable James. W. Anderson, Circuit Court Judge, the Petitioners were sentenced.

Petitioner argued on appeal that SDCL § 22-42A-4 failed to give persons of common intelligence fair notice of

what conduct is forbidden by the statute rendering it unconstitutionally vague and that it encouraged arbitrary enforcement by arresting and prosecuting authorities rendering it unconstitutionally vague.

SDCL § 22-42A-1 defines the term "drug paraphernalia," in relevant part as:

> any equipment, products and materials of any kind which are primarily used, intended for use or designed for use by the person in possession of them, in planting, propagating . . . or otherwise introducing into the human body any controlled substance or marijuana . . .

Whereas, SDCL § 22-42A-4, in the penalty phase, reads as follows:

> It is unlawful for any person, knowing the drug related nature of the object, to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used plant, propagate . . . ingest, inhale or otherwise introduce into the human body a controlled substance or marijuana in violation of this chapter.

SDCL § 22-42A-1 and SDCL § 22-42A-4 are both

based upon The Drug Enforcement Agency Model Act as propounded, August 1979. (See, SR 54) The model act is nearly identical to the South Dakota law but does have two notable difference. The addition of the word "primarily" in SDCL § 22-42A-1 and, the phrase "knowing the drug related nature of the object" in SDCL § 22-42A-4. Petitioner argued on appeal that the inclusion of "knowing the drug related nature of the object" created an objective classification of items. Since the objective classification competed with the otherwise subjective intent requirements found in the statutes, this rendered SDCL § 22-42A-4 unconstitutionally vague because the statute denied Petitioner fair notice of what conduct was prohibited.

The South Dakota Supreme Court evaded the issue and held in paragraph 18:

> [T]he South Dakota statute provides '[t]he term 'drug paraphernalia' means any equipment, products and materials of any kind which are primarily used, intended for

> use or designed for use' with illegal drugs. SDCL § 22-42A-1. While the South Dakota provisions may consider the knowledge and intent of the possessor, both provisions also have objective standards for determining what constitutes drug paraphernalia.

It is significant that the South Dakota Supreme Court, as a basis for reaching its decision, omitted the phrase "by the possessor" while citing SDCL § 22-42A-1. The phrase "by the possessor" clearly creates a subjective intent requirement.

Instead, the court held "[t]he objective standard referred to by the language of SDCL § 22-42A-4 does not conflict with the objective standard set forth in SDCL § 22-42A-1. Nor does either of these standards conflict with the *mens rea* requirement." ¶ 18.

Therefore, the lower court evaded the issue of the competing scienters in the definitional and penalty sections by determining they both created an objective classification of items which are drug paraphernalia. The lower ruling

ignored twenty years of jurisprudence interpreting statutes patterned after the Model Act creating a split between South Dakota and other courts of whether or not these statutes require the intent of the possessor be proven before an object is classified as drug paraphernalia. The South Dakota Supreme Court's decision in this case further confuses the issue of what must be proven for a conviction, thereby denying Petitioner due process of the law guaranteed to her under the Fifth Amendment to the United States Constitution.

REASON FOR GRANTING WRIT

I. THE DECISION OF THE LOWER COURT ERRED IN HOLDING SDCL § 22-42A-1 CREATED AN OBJECTIVE STANDARD IN DETERMINING WHAT IS DRUG PARAPHERNALIA.

The Petitioners were denied due process of law because the South Dakota Supreme Court erred by holding SDCL § 22-42A-1 created an objective standard in

determining what is drug paraphernalia. The South Dakota Supreme Court held:

> [T]he South Dakota statute provides '[t]he term 'drug paraphernalia' means any equipment, products and materials of any kind which are primarily used, intended for use or designed for use' with illegal drugs.' SDCL § 22-42A-1. While the South Dakota provisions may consider the knowledge and intent of the possessor, both provisions also have objective standards for determining what constitutes drug paraphernalia.

In so holding, the lower court determined "[t]he objective standard referred to by the language of SDCL § 22-42A-4 does not conflict with the objective standard set forth in SDCL § 22-42A-1. Nor does either of these standards conflict with the *mens rea* requirement." ¶ 18.

The standard for evaluating vagueness, recited by this Court in Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972), was reaffirmed in Village of Hoffman Estates v. Flipside, 455 U.S. 489, 498 (1982) :

> Vague laws offend several important values. First, Because we assume man is free to steer between

> lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discretionary enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policeman and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminating applications.

Petitioners argued to the lower court that SDCL § 22-42A-1 created a subjective standard which conflicted with the objective standard found in SDCL § 22-42A-4. Although the lower court properly determined that the language "knowing the drug related nature of the object" created an objective standard in SDCL § 22-42A-4, the court failed to properly interpret SDCL § 22-42A-1, and thus did not recognize the competing scienters which prove fatal to the South Dakota Statute on vagueness grounds.

Scienter is a necessary ingredient in drug paraphernalia statutes patterned after the Model Act to

protect against vagueness. In Hoffman Estates, 45 U.S. 489, this Court rejected, inter alia, a vagueness challenge and upheld the validity of the Village Hoffman Estates' drug paraphernalia ordinance. In so doing, this Court focused upon the scienter requirement contained in the ordinance. This Court noted a scienter requirement may obviate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed. 455 U.S. at 499. The penalty section of the Hoffman Estates ordinance stated:

> It shall be unlawful for any person or persons as principal, clerk, agent, or servant to sell any items, effects, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs as defined by Illinois Revised Statutes, without obtaining a license therefore.

455 U.S. at 506.

This court interpreted the language "marketed for use" as unequivocally requiring scienter because "it describes a retailer's intentional display and marketing of

merchandise. . .The standard requires a scienter, since a retailer could scarcely market item for a particular use without intending that use." 455 U.S. at 502. Because under the Hoffman Estates ordinance the defendant business had ample warning that its marketing activities required a license, this Court concluded the ordinance was not impermissibly vague. 455 U.S. at 503.

Applying this Court's analysis in Hoffman Estates, the Seventh Circuit in Record Head Corporation v. Sachen, 682 F.2d 672 (7th Cir. 1982), invalidated a Wisconsin drug paraphernalia ordinance. The penalty section of the ordinance, in relevant part provided:

> It shall be unlawful for any person firm or corporation to sell, offer to sell, dispense, give away or display any instrument, simulated controlled substance or simulated drug in or upon and premises which . . .

The definition section of the ordinance defined "instrument" as "a device designed for use or intended for

use in ingesting, smoking, administering or preparing any controlled substance."

The Record Head court determined the scienter requirement contained in the Hoffman Estates ordinance was not included in the Wisconsin ordinance. As a result, the Seventh Circuit held the Wisconsin ordinance did not contain a scienter standard, which would eradicate the vagueness problem and provide fair notice of what conduct was allowed.

Hoffman Estates and Record Head established that the requirement of scienter in a drug paraphernalia law allows that law to pass constitutional muster. This is so because a scienter requirement provides fair notice of the conduct proscribed.

This rational has universally been applied to statutes patterned after the Model Act, holding that no item is per se illegal: instead, the intent of the acussed must be proven:

> "To insure that innocently possessed objects are not classified as drug paraphernalia, [the definition] makes the knowledge of criminal intent of the person in control of an object a key element in the definition. Needless to say, inanimate objects are neither 'good' nor 'bad,' neither 'lawful' nor 'unlawful.' Inanimate objects do not commit crimes. But, when an object is controlled by people who use it illegally, or who intend to use it illegally, or who design or adapt it for illegal use, the object can be subject to control and the people subjected to prosecution. [The definition] requires, therefore, that an object be used, intended for use, or designed for use in connection with illicit drugs before it can be controlled as drug paraphernalia.

Record Revolution No.6 v. City of Parma, 492 F. Supp. 1157 (N.D. Ohio), rev'd., 638 F.2d 916 (6th Cir. 1980), vacated and remanded, 541 U.S. 1013, 101 S.Ct. 2998 (1981), on remand decision at 638 F.2d 916, reinstated, vacated and remanded, 456 U.S. 968 102 S. Ct. 2227 (1982), on remand, 709 F.2d 534 (6th Cir. 1983), reinstating district court's original opinion, comment at page 1166 (emphasis added). See also Tobacco Accessories and Novelty Craftsmen v. Treen, 681 F2d 378 (5th Cir. 1983); Levas and

Levas v. Village of Antioch, 684 F.2d 446, 452 (7th Cir. 1982); Stoianoff v. Montana, 695 F.2d 1214, 1220 (9th Cir. 1983); Tobacco Accessories and Novelty Craftsmen Merchants Ass'n v. Treen, 681 F.2d 378, 385 (5th Cir. 1982); Casbah, Inc. v. Thone, 651 F.2d 551, 559 (5th Cir.), cert. Denied, 455 U.S. 1005 (1982); Mid-Atlantic Trade Accessories Trade Association v. Maryland, 500 F. Supp. 834, 844 (D. Md. 1980); Pennsylvania v. Accessories Trade Association, Inc., 565 F. Supp. 1568, 1577 (M.D. Penn. 1983); Lady Ann's Oddities, Inc. v. Macy, 519 F. Supp. 1140, 1149 (W.D. Okl. 1981).

The courts have also determined that three different parties could be charged under the law via the definition of drug paraphernalia. The term "designed for use" refers to the intent of the designer/manufacturer. The term "intended for use" refers to the intent of a seller/distributor. The term "used" refers to a consuming third party public

person. See, Stoianoff v. Montana, 695 F.2d 1214, 1220 (9th Cir. 1983) ("Thus, to be subject to prosecution, the user merely is required to possess an item used to produce or consume drugs ('use'), a manufacturer must design an item that objectively is for use with drugs ('designed for use'), and the retailer or distributor must sell or market an item with the intent that it be used with drugs ('intended for use')).

All of the above referenced courts have determined that the subjective intent be proven before a retailer/distributor be held accountable under the statute. South Dakota has taken a contrary position. Petitioners were charged with delivering drug paraphernalia. Therefore, as a retailer/distributor, they must have sold the item with the intent that it be used for illegal purposes. See, Tobacco Accessories and Novelty Craftsmen Merchants Ass'n v. Treen, 681 F.2d 378, 383 (5th Cir. 1982) ("The

'intended for use' language applies to the state of mind of the individual charged with the offense of selling, distributing, or displaying drug paraphernalia. The vendor of an item which may be used innocently, incurs no criminal vulnerability unless he believes or intends that the ambivalent item will be used with a controlled substance. No item bears the stigma of drug paraphernalia under La.R.S. 40:1033(A) & (B), absent the seller's intent that it be used with a controlled substance." (footnote omitted)).

However, the South Dakota Supreme Court determined that "intended for use" created an objective classification. The court relied upon this Court's decision in Posters-N-Things, Ltd. v. United States, 511 US 513, (1994), stating, "[t]he United States Supreme Court, in considering a federal statute defining drug paraphernalia as "any equipment, product, or material of any kind which is primarily intended or designed for use 'with illegal drugs'

stated that the phrase 'primarily intended' constitutes an objective standard for determining what is drug paraphernalia." ¶ 17 (citing Posters, 511 US at 517-18 (quoting 21 USC § 857(d)).

This reliance is unfounded for two reasons. First, this Court drew a distinction between the federal statute and those patterned after the Model Act:

> Congress did not include among the listed factors a defendant's statements about his intent or other factors directly establishing subjective intent. This omission is significant in light of the fact that the parallel list contained in the Drug Enforcement Administration's Model Drug Paraphernalia Act, on which § 857 was based, includes among the relevant factors "statements by an owner...concerning [the object's] use' and 'direct or circumstantial evidence of the intent of an owner...to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Act.'

Posters, 511 U.S. at 517-18.

Second, although the statutes contain similar words,

statutory construction illuminates two very separate mental state requirements. Had the South Dakota Legislature followed Congress and gutted the language germane to the intent of the possessor, the lower court's decision would be appropriate. However, the South Dakota legislature not only included "statements by an owner. . . concerning its use" SDCL 22-42A-2(1), and "direct or circumstantial evidence of the intent of an owner. . . to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this article," SDCL 22-42A-2(5). It also stated "the term 'drug paraphernalia' means any equipment, products and materials of any kind which are primarily used, intended for use or designed for use *by the person in possession of them*, in planting, propagating . . . any controlled substance or marijuana . . . SDCL 22-42A-1 (emphasis added). Simple statutory construction dictates that SDCL 22-42A-1 does not simply

state that drug paraphernalia is any object intended for use with drugs. It clearly requires that any object is only drug paraphernalia when the person in possession of the item intends that it be used with drugs, thereby mandating that the intent of the accused must be proven for the act to be punishable under the statute. Therefore, applying this Court's reasoning in Posters-N-Things to the South Dakota statute was plain error and runs counter to how every other court which has reviewed a statute patterned after the Model Act has determined. This misapplication has denied Petitioners their due process right to have fair notice of what conduct is prohibited.

Since the South Dakota Supreme Court ruled that both SDCL 22-42A-1 and SDCL 22-42A-4 create objective classifications of items that are drug paraphernalia, the court evaded the Petitioners' claim that SDCL 22-42A-4 is unconstitutionally vague. The South Dakota statute is

unique because it contains two contradictory mental state requirements. The Model Act is almost identical to the South Dakota law, however, the South Dakota Legislature put its fingerprints on the South Dakota Act by including in SDCL § 22-42A-4, the language "knowing the drug related nature of the object." The legislature's inclusion of this fingerprint proves fatal to the South Dakota Act on vagueness grounds.

The difference between the South Dakota statute and other statutes which include the mental state of constructive knowledge is illustrated in Stoianoff v. Montana, 695 F. 2d 1214 (9th Cir. 1983). In that case, the court upheld the validity of the Montana drug paraphernalia statute challenged, inter alia, on grounds of vagueness. In that case, the court held the statute contained two "state of mind" requirements which the court analyzed as follows:

> The first, for the merchant involved in sales of drug paraphernalia, is that he or she must intend that the

> item be used to produce or consume drugs. In addition, under M.C.A. 45-10-104, the merchant must, upon a delivery of an item, know or be in a position where he or she "reasonably should know" that the item will be used in the production or consumption of drugs.

695 F.2d at 1220.

The Stoianoff court reasoned because the State must prove the merchant first must intend that an item be designed as drug paraphernalia, the statute contained a specific mens rea element before the constructive knowledge state of mind came in to play. 695 F. 2d at 1221. The scienter requirement therefore alleviated any vagueness problems in the statute. Id. Accord Camille Corporation v. Phares, 705 F. 2d 233 (7th Cir. 1983); Florida Businessmen for Free Enterprise v. City of Hollywood, 673 F.2d 1213 (11th Cir. 1982); New England Accessories Trade Association v. City of Nashua, 679 F.2d 1 (1st Cir. 1982); Cabash Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981); see 69 A.L.R. Fed. 15, 41.

In the drug paraphernalia acts from other jurisdictions, both the definitional and the penalty sections required scienter based upon the seller's actual or constructive knowledge regarding how the material would be used. The same cannot be said concerning the South Dakota Act. Section 22-42A-4 predicates criminal liability on the defendant's objective knowledge in addition to the seller's specific intent that the materials be used in connection with drugs. Accordingly, the Act is not subject to the same interpretation as the statutes upheld in the foregoing cases because the mental state requiring the objective knowledge of the drug related nature of the item in the penalty section is contradictory to the specific intent required by the definition of drug paraphernalia contained in section 22-42A-1.

The identical issue of conflicting mental state was raises in an Illinois Supreme Court decision, People v.

Monroe, 515 NE 2d 42 (Ill 1987). The Illinois law in question defined drug paraphernalia as an item "peculiar to and marketed for use" with a controlled substance. The penalty section, however, only required that a seller "reasonably should have known" an item to be drug paraphernalia. The court held "while the legislature apparently intended that scienter be included in the definition of drug paraphernalia, the penalty section allows for convictions based upon the constructive knowledge of the seller." Id. Thus, the court held the statute void for vagueness.

The South Dakota Act defines drug paraphernalia on a subjective basis, "intended for use" yet penalizes on an objective basis, "knowing the drug related nature of the object". Therefore, as in the Illinois case, the definition in the South Dakota Act requires scienter, whereas the penalty section removes the specific intent by allowing for mere

constructive knowledge i.e. "reasonably should know."

In contrast, rather than containing two consistent and cohesive state of mind requirements as in the cases from other jurisdictions discussed above, the South Dakota Act contains two contradictory state of mind requirements which effectively remove the scienter necessary to withstand constitutional challenge. Moreover, the Act's contradictory state of mind requirements serve only to confuse both the retailer and the prosecuting authorities. As a result, unlike the laws from other jurisdictions, the South Dakota statute is impermissibly vague.

Although the lower court properly determined that "knowing the drug related nature of the object" creates an objective classification, by incorrectly determining that SDCL § 22-42A-1 also creates an objective classification of items, denied Petitioner due process of law guaranteed her under the Fifth Amendment to the United States

Constitution.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the judgment of the South Dakota Supreme Court.

Respectfully submitted September 10, 2002.

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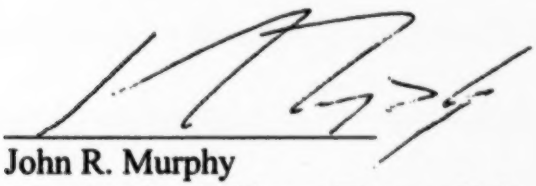

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APPENDIX A

STATE OF SOUTH DAKOTA, Plaintiff and Appellee, v. THOMAS HOLWAY and ELLIE HOLWAY, Defendants and Appellants.

22075, # 22079

SUPREME COURT OF SOUTH DAKOTA

2002 SD 50;644 N.W.2d 624;2002 S.D. LEXIS 55

March 25, 2002, Considered on Briefs

May 1, 2002, Opinion Filed

PRIOR HISTORY: [*1] APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT PENNINGTON COUNTY, SOUTH DAKOTA. THE HONORABLE JAMES W. ANDERSON Circuit Court Judge of the Sixth Judicial Circuit, Sitting by Designation.

DISPOSITION: Decision of the trial court affirmed.

COUNSEL: MARK W. BARNETT Attorney General JOHN M. STROHMAN Assistant Attorney General Pierre, South Dakota Attorneys for plaintiff and appellee.

JOHN R. MURPHY Rapid City, South Dakota Attorney for defendant and appellant Thomas Holway.

ERIC D. WHITCHER Rapid City, South Dakota Attorney for defendant and appellant Ellie Holway.

JUDGES: GILBERTSON, Chief Justice. SABERS, AMUNDSON and KONENKAMP, Justices, and GORS, Acting Justice, concur. ZINTER, Justice, not having been a member of the Court at the time this action was submitted

to the Court, did not participate.

OPINIONBY: GILBERTSON

OPINION:

GILBERTSON, Chief Justice

[P1.] Thomas Holway and his ex-wife, Ellie Holway, were co-defendants tried together and convicted of three counts of delivery of drug paraphernalia in violation of SDCL 22-42A-4 and SDCL 22-3-3. The Holways allege a violation of procedural due process by claiming SDCL 22-42A-4 [*2] is unconstitutionally vague. Both defendants also appeal the sufficiency of the evidence as it relates to their intent to sell the smoking devices to contain, conceal or inhale a controlled substance, as well as their knowledge of the objects' drug-related nature. We affirm.

FACTS AND PROCEDURE

[P2.] Thomas Holway is a co-owner of Video Blue, an adult bookstore in Rapid City, South Dakota. Ellie Holway is an employee at Video Blue. The Holways attended a trade show in Las Vegas and determined that it would be "very lucrative" to carry certain smoking devices for sale in the store. Thomas Holway contacted the Pennington County State's Attorney, Glenn Brenner (Brenner), to determine if selling the devices would be legal. Brenner read the statute to him and informed him that if it could be proven that the devices could be used for smoking marijuana, law enforcement would be involved.

[P3.] When Thomas contacted Brenner a second time and

showed him a "sample" pipe, Brenner referred him to Todd Love, the drug prosecutor for the Attorney General's Office. One of the Holways did contact Love with the same questions presented to Brenner. Love informed the Video Blue [*3] representative n1 that it is illegal to deliver, or to possess with the intent to deliver, any drug paraphernalia. He also informed him that he would not be able to claim immunity based upon anything Brenner had said to them. Love explained that the State Attorney General's Office could prosecute Video Blue's owners and employees for drug violations even if the Pennington County State's Attorney did not.

----------Footnotes----------

n1. Love was not sure whether he talked to Thomas Holway or Robert Holway, Thomas' father and co-owner of Video Blue.

----------End Footnotes----------

[P4.] In April 2000, the devices were put out for sale in two display cases at Video Blue. The display cases contained various items used for smoking including: pipes, water pipes, bongs, wood dugouts, and carburetors. They also contained roach clips and pipes disguised to look like cigarette lighters, lipstick containers, and hi-liter felt tip markers. Each display case had a sign stating "All paraphernalia sales are only sold with the understanding that the purchaser has only legal intent [*4] for its use." Yet, no cigarette or pipe tobacco was sold in the store.

[P5.] On April 14, 2000, the South Dakota Division of

Criminal Investigation (DCI) began investigating Video Blue based on allegations that drug paraphernalia was being sold there. Four officers were involved in the investigation: Deputy Sheriff Jeff Whittle (Whittle), Deputy Sheriff Martin Graves (Graves), Detective Dale McCabe (McCabe), and DCI Supervising Agent Robert Overturf (Overturf).

[P6.] Whittle entered the store on April 14, 2000, and purchased a "one-hitter," a small water pipe, and a wood "dug-out" pipe from Ellie. Ellie gave him a free package of screens, which are commonly used to prevent a marijuana smoker from inhaling the seeds and stems. When Whittle made a comment about how a friend of his got caught selling items like these, Ellie pointed to the sign. Whittle mockingly replied that he, of course, had only legal intent. Ellie raised her hands and said, "Well, I don't want to know about it." She also acknowledged Whittle's comment about a wood dug-out being an "old standard."

[P7.] Graves entered the store on April 18, 2000, and purchased a red bong and a metal pipe from Ellie. [*5] McCabe also entered the store on April 18. He purchased a school bus pipe and a blue hi-liter pipe from Ellie. McCabe asked Ellie if they made a pipe that looked like a police car. She replied "They would probably frown upon that." McCabe also inquired whether he could get a discount. Ellie spoke with Thomas, who agreed to the discount. She also gave McCabe a free package of screens.

[P8.] Thomas and Ellie were each charged with seven counts of delivery of drug paraphernalia in violation of SDCL 22-42A-4 and SDCL 22-3-3. The two were tried together before a jury on June 5-6, 2001. Thomas and Ellie were each convicted on three of the seven counts and

sentenced to 90 days in jail on count I, and two years in prison on counts III and VII. n2 The terms were to run consecutively, with execution of the prison sentences suspended. Both defendants appeal the following issues:

1. Whether SDCL 22-42A-4 is unconstitutionally vague and encourages arbitrary enforcement, thereby causing a violation of procedural due process.

2. Whether the evidence was sufficient to convict Thomas and

Ellie Holway on counts [*6] I, III and VII of delivery of drug paraphernalia.

----------Footnotes----------

n2. Thomas and Ellie Holway were convicted on count I for delivering a cigarette bat, count III for delivering a "dug-out" pipe, and on count VII for delivering a camouflaged hi-liter pipe.

----------End Footnotes----------

STANDARD OF REVIEW

[P9.] First, whether the enforcement of SDCL 22-42A-4 amounts to a violation of procedural due process is a constitutional question reviewed by this Court *de novo*. City of Pierre v. Blackwell, 2001 SD 127, P7, 635 N.W.2d 581, 584 (citing Steinkruger v. Miller, 2000 SD 83, P8, 612 N.W.2d 591, 595).

[P10.] Second, this case involves the statutory interpretation

of the definition of "drug paraphernalia." This interpretation is a question of law reviewed by this Court *de novo*. H&W Contracting, LLC v. City of Watertown, 2001 SD 107, P17, 633 N.W.2d 167, 173 (citation omitted).

[P11.] Third, "in determining the sufficiency of the evidence on review, the question [*7] presented is whether there is evidence in the record which, if believed by the fact finder, is sufficient to sustain a finding of guilt beyond a reasonable doubt." State v. Buchholz, 1999 SD 110, P33, 598 N.W.2d 899, 905 (quoting State v. Knecht, 1997 SD 53, P22, 563 N.W.2d 413, 421). Therefore, we must accept the most favorable inferences to be fairly drawn in favor of the verdict. State v. Charles, 2001 SD 67, P10, 628 N.W.2d 734, 737 (citation omitted). We will not reweigh or resolve conflicts in the evidence. State v. Karlen, 1999 SD 12, P49, 589 N.W.2d 594, 605. Nor will we pass on the credibility of the witnesses. *Id.* "No guilty verdict will be set aside if the evidence, including circumstantial evidence and reasonable inferences drawn therefrom, sustains a reasonable theory of guilt." *Buchholz*, 1999 SD 110 at P33, 598 N.W.2d at 905 (quoting *Knecht*, 1997 SD 53 at P22, 563 N.W.2d at 421).

ANALYSIS AND DECISION

[P12.] 1. Whether SDCL 22-42A-4 is unconstitutionally vague and encourages arbitrary enforcement, thereby causing a violation of [*8] procedural due process.

[P13.] The standard for determining whether a statute is unconstitutionally vague is whether it "gives a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." State v. McGill, 536 N.W.2d 89, 95 (SD 1995). While a statute must define the crime with

clarity and certainty, there is no bar to its broad application. *Id.* (citation omitted). Furthermore, a party challenging the constitutionality of a statute bears the burden of overcoming a strong presumption to the contrary. State v. Hoeft, 1999 SD 24, P15, 594 N.W.2d 323, 326.

There is a strong presumption that the laws enacted by the Legislature are constitutional and the presumption is rebutted only when it clearly, palpably and plainly appears that the statute violates a provision of the constitution. Further, the party challenging the constitutionality of a statute bears the burden of proving beyond a reasonable doubt that the statute violates a state or federal constitutional provision.

State v. Hauge, 1996 SD 48, P4, 547 N.W.2d 173, 175 (quoting Sedlacek v. Teener Baseball Program, 437 N.W.2d 866, 868 (SD 1989)) [*9] (additional citations omitted).

[P14.] The Holways claim that SDCL 22-42A-4 is unconstitutionally vague and encourages arbitrary enforcement. Specifically, they allege that the scienter requirement in SDCL 22-42A-1, the definitional section, "competes" with the scienter requirement in SDCL 22-42A-4, the penalty section. The Holways argue that, as a result of this "contradiction," they did not have sufficient notice of what conduct is prohibited.

[P15.] Notably, the Holways do not assert that the statute is overbroad, but only that it is unconstitutionally vague as applied to them. In essence, they claim that their right to procedural due process has been violated. *See* Vill. of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 495, 102 S. Ct. 1186, 1192, 71 L. Ed. 2d 362, 369

(1982) (holding claimant cannot assert vagueness challenge as applied to others unless statute proscribes constitutionally protected conduct); People in the Interest of P.B., 339 N.W.2d 121, 123 (SD 1983) (stating vagueness challenge, when First Amendment rights are not involved, is limited to the specific [*10] facts of the case). Therefore, we must determine whether the scienter requirements of the two sections, as applied to the facts of this case, actually conflict and, therefore, failed to give the Holways sufficient notice that selling certain smoking devices constitutes illegal delivery of drug paraphernalia.

[P16.] The Holways assert that the language in SDCL 22-42A-4 "knowing the drug[-]related nature of the object" creates an objective classification of drug-related objects and, thereby, conflicts with the subjective intent requirement in SDCL 22-42A-1. In addition, the Holways claim that it has universally been held that all statutes penalizing the delivery of drug paraphernalia must be based upon the subjective intent of the possessor because no object is per se illegal. This, however, is only partially true.

[P17.] While a drug paraphernalia statute may have a *mens rea* element to ensure "that those acting in good faith are not swept within a law's broad or ambitious language," it must also have an objective standard for determining what is drug paraphernalia. *See* Garner v. White, 726 F.2d 1274, 1278 (8thCir 1984) [*11] (rejecting constitutional challenge to Arkansas drug paraphernalia statutes) (citations omitted). This objective standard serves to avoid the very same arbitrary enforcement that the Holways complain of herein. The United States Supreme Court, in considering a federal statute defining drug paraphernalia as "'any equipment, product, or material of any kind which is primarily intended

or designed for use' with illegal drugs" stated that the phrase "primarily intended" constitutes an objective standard for determining what is drug paraphernalia. Posters-N-Things, Ltd. v. United States, 511 U.S. 513, 517-18, 114 S. Ct. 1747, 1750, 128 L. Ed. 2d 539, 547 (1994) (quoting 21 USC §§ 857(d)). The Supreme Court upheld that statute as giving sufficient notice as to what conduct is prohibited. *Id.* at 526, 114 S. Ct. at 1754, 128 L. Ed. 2d at 552.

[P18.] Likewise, the South Dakota statute provides "the term 'drug paraphernalia' means any equipment, products and materials of any kind which are primarily used, intended for use or designed for use" with illegal drugs. SDCL 22-42A-1. While the South Dakota provisions [*12] may consider the knowledge and intent of the possessor, both provisions also have objective standards for determining what constitutes drug paraphernalia. Furthermore, as in *Garner*, the South Dakota law "is virtually identical to the Model Drug Paraphernalia Act, which has now been upheld by this circuit . . . and in every other circuit considering its constitutionality." 726 F.2d at 1278-79 (citations omitted). The objective standard referred to by the language of SDCL 22-42A-4 does not conflict with the objective standard set forth in SDCL 22-42A-1. Nor does either of these standards conflict with the *mens rea* requirement.

[P19.] The Holways further maintain that SDCL 22-42A-4 encourages arbitrary enforcement because different prosecutors may view the statutes differently. As explained above, the very standard in SDCL 22-42A-1 that the Holways complain is too objective is the same standard that prevents such arbitrary enforcement. *See, e.g.*, Gen. Stores v. Bingaman, 695 F.2d 502 (10thCir 1982) (rejecting

discriminatory enforcement [*13] challenge on basis that statute contained examples and relevant factors to provide sufficient guidance for authorities in applying the Act uniformly). All law enforcement requires some degree of judgment. A law is not rendered unconstitutionally vague merely because the decision of one official applying the factors is different from that of another official applying those same factors.

[P20.] **2. Whether the evidence was sufficient to convict Thomas and Ellie Holway on counts I, III and VII of delivery of drug paraphernalia.**

[P21.] SDCL 22-42A-4 sets forth the elements for the crime of delivering drug paraphernalia:

No person, knowing the drug[-]related nature of the object, may deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to . . . contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance or marijuana in violation of this chapter. Any person who violates any provision of this section is guilty of a Class 6 felony.

The definition of drug paraphernalia [*14] is found at SDCL 22-42A-1:

The term "drug paraphernalia" means any equipment, products and materials of any kind which are primarily used, intended for use or designed for use by the person in possession of them, . . . containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human

body any controlled substance or marijuana in violation of the provisions of this chapter. It includes, but is not limited to:

* * *

(10) Objects used, intended for use or designed for use in ingesting, inhaling or otherwise introducing marijuana, cocaine, hashish or hashish oil into the human body, such as:

(a) Metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens, permanent screens, hashish heads or punctured metal bowls;

(b) Water pipes;

(c) Carburetion tubes and devices;

(d) Smoking and carburetion masks;

(e) Roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;

(f) Miniature cocaine spoons and cocaine vials;

(g) Chamber pipes;

(h) Carburetor pipes;

(i) Electric pipes;

(j) Air-driven pipes;

(k) Chillums; [*15]

(l) Bongs; and

(m) Ice pipes or chillers.

Therefore, to sustain a conviction, the State is required to prove that: (1) the defendant delivered or possessed with the intent to deliver an object; (2) that object is drug paraphernalia; (3) the defendant knew of the drug-related nature of the object; and (4) the defendant knew or reasonably should have known that the object would be used to introduce illegal drugs into the human body.

[P22.] The Holways claim that they cannot be guilty because SDCL 22-42A-1 requires those in possession to intend the objects for drug use. They claim that because they did not intend the items for drug use and the undercover officers to whom they sold the objects did not intend or actually use them for drugs, the conviction cannot be sustained. We disagree. The statute identifies drug paraphernalia in the disjunctive. It includes objects "primarily used" for drug use, objects intended for drug use by the person in possession of them, or objects designed for drug use by the person in possession of them. The Holways cannot escape liability by pretending to ignore the most common use of such objects.

[P23.] While [*16] the Holways claim that the objects could have been used to smoke tobacco, we agree with the trial court's characterization of the items herein as being "primarily used" to introduce illegal drugs into the human body. The Holways also assert that they did not know of the objects' drug-related nature. But the jury was justifiably incredulous. It is difficult to believe that those who chose to

sell such items because they would be "very lucrative," but who first made inquiries to the State's Attorney and the Attorney General to determine how they could escape liability, did not have a clue as to the drug-related and *illegal* nature of such items.

[P24.] Furthermore, liability in this case is not affected by the fact that one individual owned the store and supplied the objects while the other actually made the sales. SDCL 22-3-3 provides that those who intend to promote or facilitate a crime are to be held accountable as a principal to the crime. SDCL 22-42A-2 provides that a court, in determining whether an object is drug paraphernalia, may consider statements by the person in possession of the object, direct or circumstantial [*17] evidence of intent, national and local advertising concerning the object's use, the manner in which the object is displayed, the existence or scope of legitimate uses, and expert testimony.

[P25.] Ellie actually sold the items at issue. She gave both Whittle and McCabe the free packages of screens, which are commonly used for smoking marijuana, when they purchased the pipes. She indicated that she recognized a wood dug-out as being an "old standard." Yet, an expert witness testified that it certainly is not an "old standard" for smoking tobacco. When Whittle commented on the possible illegality of selling the items, she pointed to the sign and informed him that she did not want to know about his supposedly "legal intent." Her reply to McCabe's question of whether she had any pipes shaped like police cars indicates that she knew law enforcement would "frown upon" having a pipe, used for smoking marijuana, designed in such a shape.

[P26.] Thomas not only owned the store that the items were sold in, but he was also intricately involved in stocking the items for sale. His statements to Brenner are indicative of his knowledge that the items he wished to sell were legally questionable, [*18] at best. The fact that he approved the discount to McCabe indicates he supervised the sales of the items. There was evidence that he displayed the items at issue with many others specifically enumerated within SDCL 22-42A-1(10) as constituting drug paraphernalia. Copies of Cannabis Culture and High Times, magazines advocating drug use, show photographs advertising the very same objects.

[P27.] The facts laid out above give sufficient reason for a jury to believe, beyond a reasonable doubt, that not only were the objects drug paraphernalia, but that Thomas and Ellie knew or reasonably should have known of the objects' drug-related nature. Accepting, as we must, the evidence and the most favorable inferences to be drawn therefrom in favor of the verdict, we do not see that the judgment was in error. Therefore, we affirm the decision of the trial court.

[P28.] SABERS, AMUNDSON and KONENKAMP, Justices, and GORS, Acting Justice, concur.

[P29.] ZINTER, Justice, not having been a member of the Court at the time this action was submitted to the Court, did not participate.